THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Maité Murphy, Circuit Court Judge

Case No. 2012-CP-15-00262
Appellate Case No. 2013-002555

Melissa Jean Marks, ...Appellant,

Old South Mortgage Corporation, John Does v. 1-100, Nationstar Mortgage, LLC, Defendants, Of whom Nationstar Mortgage, LLC, is the..... .....Respondent.

FINAL BRIEF OF APPELLANT

Melissa Jean Marks
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Round O, SC 29474
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Appellant/Plaintiff *Pro Se*

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STATEMENT OF THE CASE

On April 6, 2012, the Appellant/Plaintiff *Pro Se*, Melissa Jean Marks, ("Plaintiff") filed a declaratory judgment complaint and petition for injunctive relief against the originator of a note and mortgage, Old South Mortgage Corporation ("Old South"), alleging the instruments are invalid and unenforceable on the grounds of fraudulent misrepresentations of material facts, fraudulent or illegal acts, and unconscionable mortgage contract. Old South filed an answer on May 3, 2012 but has had very minimal involvement in defending the action since.

Plaintiff alleged in her complaint that she had not received actual notice of who currently owns the mortgage, there are no lawful owners, and Old South, a dissolved domestic corporation since 2008, is the only lien holder of record recognized by the county register of deeds with no assignments having been recorded according to a report of Edisto Title Services and the clerks at the register of deeds. Plaintiff identified all known parties who may claim to own the mortgage in her complaint, and she also named as defendants John Does 1-100 and Fictitious Corporations 1-100, which she intended to represent all persons and entities that may claim to have an interest and whose identities may be difficult or impossible to ascertain with a reasonable degree of certainty.

In May 2012, Nationstar Mortgage, LLC ("Nationstar") intervened in the action claiming to be the owner of the note and mortgage and real party in interest, which Plaintiff opposed on the grounds that the evidence she had obtained showed that Nationstar is a Fannie Mae servicer, it is not the owner of the mortgage and does not have standing to defend. Nationstar claimed that Plaintiff had incorrectly referred to

Nationstar as the servicer, that Nationstar was not merely servicing but was the legal holder of the note. (R. p. 526)

On July 18, 2012, Nationstar presented the alleged original note to the court at the hearing on its motion to intervene and claimed that Nationstar had purchased the note from Flagstar Bank ("Flagstar"), Flagstar had endorsed the note in blank to Nationstar, and Nationstar is a necessary party that must be joined pursuant to Rule 24(a), SCRCP and S.C. Code Ann. 15-53-80 (1976). (R. pp. 1,225-1,226)

Nationstar ignored the documentary evidence Plaintiff submitted before and during the hearing proving Fannie Mae's involvement (R. pp. 508-510; 512; 1,231, lines 4-19) and proceeded to omit Fannie Mae from the chain of title when the court asked Nationstar for the history of the paper. (R. p. 1,226, lines 16-25) Nationstar did not state on the record that it was seeking to intervene to protect or defend any other party's interest but its own. In fact, Nationstar requested to be substituted for all defendants in its motion, which the court denied. (R. pp. 6; 478; 1,228, lines 16-21) The court decided that Nationstar did not have standing to dismiss other parties or Plaintiff's case, and since Plaintiff questioned the transfer of the interest, that matter should be subject to an evidentiary hearing and not done on a motion for intervention. (R. pp. 1,238, lines 23-25; 1,239, lines 1-5)

Accordingly, the court granted Nationstar's motion to intervene by Order entered on August 2, 2012, which was based on its claim of ownership as stated in that Order at page 2 (R. p. 5), and ordered that Nationstar be joined as a defendant and file an answer to the complaint within 30 days. The court also granted Plaintiff's motion to continue

hearing on her motion for summary judgment and motion for leave to amend her motion for summary judgment upon receipt of Nationstar's answer.

Plaintiff later explained to the court that Nationstar raised arguments in its answer that are not addressed in her motion for summary judgment, and she planned to file an amended motion, if possible, upon completion of discovery. Since Plaintiff's motion for summary judgment was still pending on the court's motions roster, the motion was set for hearings that had to be removed or continued, so Plaintiff withdrew the motion to resolve the scheduling issue. She would not have withdrawn her motion if Nationstar's motion had been denied, and her motion would have been heard on July 18, 2012 instead.

On October 4, 2012, Nationstar definitively reversed its position by responding under oath in its answers to Plaintiff's interrogatories that Fannie Mae is the owner of the note and mortgage. (R. p. 1,311) Consequently, on October 15, 2012, Plaintiff filed a motion for leave to amend complaint seeking leave of the court to amend her complaint to add Fannie Mae as a defendant, to remove and dismiss without prejudice John Does 1-100 and Fictitious Corporations 1-100, so she could serve Fannie Mae with a summons and her original complaint. (R. pp. 674-705) Since Nationstar opposed Plaintiff's motion to amend, the motion was heard on January 28, 2013, and Plaintiff's motion to compel Nationstar to completely answer her discovery requests was also heard on the same date. (R. pp. 1,244-1,282)

On February 27, 2013, the court's Orders denying both of Plaintiff's motions were entered, and her motion for reconsideration was denied by Order entered on April 9, 2013 because the court believed Nationstar's erroneous claim that Plaintiff did not have

standing to bring the action and only the trustee in her pending Chapter 13 bankruptcy case has standing to bring the action. (R. pp. 17-18)

Nevertheless, because Nationstar opposed it, the court subsequently denied Plaintiff's motion to defer ADR conference, which Plaintiff had filed and was heard prior to her receiving the court's decision on her motion for reconsideration. (R. pp. 19-20) In doing so, the court ignored Plaintiff's argument that she was trying to add Fannie Mae pursuant to the court's statements at the first hearing that the court wanted all necessary parties and information from everybody, and Fannie Mae had not been served with the complaint. (R. p. 1,238, lines 1-14)

The court also ignored the fact that at Nationstar's insistence, the court had just determined Plaintiff did not have standing to bring the action, which implied she would not have standing to settle it at mediation either. The court also ignored the fact that no evidentiary hearing had been held to determine what, if any, specific rights and interest Nationstar had in the instruments because, at that point in time, Plaintiff was reasonably seeking the necessary discovery responses from Nationstar to establish or disprove that with a higher degree of certainty. Notwithstanding the foregoing, the court denied Plaintiff's motion for reconsideration and then ordered the parties to attend mediation within 30 days. The parties attended mediation on April 25, 2013 at the office of the court-appointed mediator, Elbert O. Duffie, III, which was unproductive.

Plaintiff made extensive efforts trying to persuade the court that she had standing to bring the action and her bankruptcy filings are not intended and do not waive or adversely affect or bar any of her causes of action but was unable to overcome the

prejudicial impact of the court's Order denying her motion to amend and the findings therein. Consequently, in the Orders entered on October 9, 2013, the court denied Plaintiff's motion to dismiss Nationstar from the action with prejudice and granted Nationstar's motion for summary judgment dismissing her case on the grounds her causes of action are barred by *judicial estoppel* and *res judicata* due to her bankruptcy filings. (R. pp. 21-32)

In Plaintiff's pleadings, she alleged that both Fannie Mae and Nationstar had committed fraud or illegality affecting the instrument and therefore cannot obtain the rights of a holder in due course by virtue of possession after the fact as a matter of law. (R. pp. 1,049-1,059) Plaintiff further alleged that neither of the note endorsements are credible evidence that a lawful transfer of the note and mortgage has ever taken place. (R. pp. 1,060-1,062) Plaintiff cited to substantial law, facts and evidence in support, all of which was ignored. Plaintiff's motion for reconsideration was likewise ignored (R. pp. 1,117-1,200), and even though Nationstar had not yet filed an opposition, the court denied Plaintiff's motion for reconsideration by Order entered on November 6, 2013 (R. pp. 33-34), which brings us to Plaintiff's appeal of the adverse rulings in her case seeking reversal.

Plaintiff believes her legal rights to a trial and declaratory judgment on the merits of her case were prejudiced and denied without just cause and without due process. In addition, as a result of the court's actions, which emboldened Nationstar, Plaintiff is currently trying to defend herself against Nationstar's claim for attorney fees and costs in excess of $47,000 in the bankruptcy court. Since Plaintiff is bankrupt and would be

unable to pay such a substantial judgment if awarded, Nationstar would likely foreclose on her home. (R. pp. 895-896; 965-973) Therefore, Plaintiff prays this Court will take that into consideration and carefully consider her appeal.

ARGUMENTS

I. THE TRIAL COURT ERRED IN FAILING TO FOLLOW THE LAW OF THE CASE THAT NATIONSTAR DID NOT HAVE STANDING TO MOVE TO DISMISS THE CASE AND OTHER PARTIES AND THE QUESTIONED TRANSFER OF THE INTEREST IN THE NOTE AND MORTGAGE SHOULD BE SUBJECT TO AN EVIDENTIARY HEARING.

U.S. Legal published an article online summarizing the "Law of the Case Doctrine," and cited to three exceptions that may arise as follows: "[1] if the decision is clearly erroneous and enforcement would cause manifest injustice; [2] if intervening controlling authority makes reconsideration appropriate; or [3] if substantially different evidence was adduced at a later date." The article cited to Sowder v. United States, 251 Fed. Appx. 444 (9th Cir. Wash. 2007) as the source of those exceptions. Plaintiff found this a helpful summary of what the exceptions to the law of the case doctrine are in other jurisdictions and offers it to this Court for consideration.

In consideration of those few exceptions, Nationstar did not produce anything concrete in support of its claims related to the instruments that justified the court overruling or ignoring the law of the case established by the court at the hearing on Nationstar's motion to intervene ("the first hearing"). At the first hearing, the court found that Nationstar did not have standing to dismiss or be substituted for other parties or to file a motion to dismiss Plaintiff's case and the questioned transfer of the interest should be subject to an evidentiary hearing and not done on a motion for intervention.

On the contrary, Nationstar's admissions in discovery proved Plaintiff was correct in the allegations she made while opposing its motion to intervene and that Nationstar had in fact lied to the courts in order to obtain permission to intervene and only admitted the truth after it received what it wanted from the court during the first hearing.

The note and interest in the instruments had not been transferred to Nationstar on or before the dates Plaintiff filed her bankruptcy and state cases, and in order to have standing to intervene and raise legal arguments in defense of her pending state court action, the note and interest in the instruments had to have been transferred to Nationstar on or before the date she filed the case. Plaintiff was proven correct that had not occurred by Nationstar's own subsequent admissions in discovery.

Plaintiff had carefully investigated, reviewed the documents available and believed the transfer had not occurred prior to filing her case. That is why Plaintiff did not sue Nationstar, she did not require it to defend an interest that is not its interest to defend, and she did not voluntarily grant Nationstar standing to defend or the right to prejudice her case with legal arguments it did not have standing to raise. Unfortunately, the court did that in failing to follow the law of the case it established at the first hearing.

Plaintiff repeatedly brought it to the court's attention, as the record shows, but the court kept refusing to acknowledge and address the fact Nationstar had falsely claimed ownership of the instruments before the courts, and its own subsequent admissions in discovery prove Nationstar knew it was not in possession of the note, it was not the holder and not the owner of the instruments on certain dates it had claimed otherwise before the courts to obtain permission to intervene. That being the case, Nationstar was

obviously estopped from asserting a different position, and arguably, counsel should have withdrawn from the action or the court should have dismissed Nationstar from the action *sua sponte* upon discovering Nationstar had lied to everyone to get what it wanted.

Nationstar's false claims of ownership of the instruments before the courts are summarized in a table attached as Exhibit 1 to Plaintiff's motion to dismiss Nationstar (R. pp. 910-911), and Nationstar's discovery responses are attached thereto as Exhibit 3 (R. pp. 918-935, and Plaintiff will provide only a few key pieces of evidence herein as follows.

In its Answer to Interrogatory No. 5, Nationstar stated, "Nationstar requested the original note from Fannie Mae's custodian, Bank of NY Mellon, and Nationstar received the original note from Bank of NY Mellon on May 31, 2012. Thereafter, Nationstar forwarded the original note to its counsel, Rogers Townsend & Thomas, PC." (R. pp. 919-920)

In its Answer to Interrogatory No. 8, Nationstar stated, "Fannie Mae is the owner of the note and mortgage. Fannie Mae's address and agent for service of process is of public record." (R. p. 920)

In its Answer to Interrogatory No. 12, asking whether Nationstar notified Fannie Mae regarding the contents of Plaintiff's Complaint, Nationstar stated, "Yes. Notification was sent to Bankruptcy.Administration@fanniemae.com on May 29, 2012." (R. p. 922)

In its Answer to Interrogatory No. 21, asking why the copy of the note Nationstar attached to its bankruptcy Form 10 claim form does not include a copy of Flagstar Bank's

purported endorsement in blank, Nationstar stated, "The endorsement is on the back of the original Note, and only the front of the Note was copied. [...]" (R. p. 926)

In its Answer to Interrogatory No. 25, asking how Nationstar obtained the copy of the note that is attached to its Form 10 claim form it submitted to the bankruptcy court, Nationstar stated, "The copy of the note was obtained from Nationstar's imaging systems." (R. p. 927)

In its Answer to Request to Admit No. 4, Nationstar stated, "[...] Nationstar admits [it] is not the custodian of the original note, but also admits it was the holder at the July 18, 2012 hearing. [...]" (R. p. 934)

In its Answer to Request to Admit No. 5, seeking an admission "that during the time period October 2009 to May 2012, the Bank of New York Mellon was at all times the custodian and in possession of the original note", Nationstar stated, "Admit." (R. p. 934)

In its Answer to Request to Admit No. 6, Nationstar stated, "[...] To the extent this Request is intended to request whether the first time Nationstar was in possession of the original note was May 2012, this Request is admitted. [...]" (R. p. 934)

In its Answer to Request to Admit No.7, Nationstar stated, "Nationstar objects to this Request to the extent that 'true and correct copy of the original note' is not defined. Nationstar admits the copy of the note attached to the proof of claim in Plaintiff's bankruptcy did not include a copy of the back of the note" [where Flagstar's alleged endorsement in blank was purportedly stamped on the note]. (R. p. 935)

The foregoing evidence is clear and convincing evidence of the following facts:

(a) Nationstar did not own the instruments on or before the dates Plaintiff filed her bankruptcy case on April 20, 2011 and her state case on April 6, 2012; (b) Nationstar did not have possession of the original note and therefore was not the holder on or before the dates the cases were filed; (c) all the rights in the instruments had not been transferred to Nationstar on or before the dates the cases were filed; and (d) Nationstar knew facts (a), (b), and (c) prior to stating or implying otherwise to the courts while trying to intervene.

Nationstar did not have the original note to copy and attach to its bankruptcy proof of claim that it filed on April 29, 2011 (R. pp. 228-250; 942-950), and since at that time Nationstar did not have Flagstar's note endorsement evidencing an assignment of the note from Flagstar to any party, Nationstar knew the note had not been assigned to Nationstar, and it was not the holder or owner of the note at that time. Nevertheless, Nationstar claimed it was the creditor in its bankruptcy proof of claim, which Plaintiff reasonably interpreted as Nationstar's first false claim of ownership of the note and mortgage. Nationstar's apparent intent to falsely claim ownership of the instruments before the bankruptcy court is further evidenced by its own subsequent false claims of ownership of the instruments before the state court to get what it wanted there.

Prior to the first hearing in July 2012, Nationstar claims it sent an email to Fannie Mae's bankruptcy department on May 29, 2012, and then requested and received the original note from Fannie Mae's custodian on May 31, 2012. Therefore, this also proves Nationstar knew prior to the first hearing that Fannie Mae was claiming to be the owner of the note and mortgage on or before the dates Plaintiff filed her bankruptcy and state cases, and Nationstar had intentionally lied claiming otherwise during the first hearing to

get what it wanted.

In addition, while Nationstar was in the process of intervening, Nationstar had submitted notices, pleadings and statements to the bankruptcy and state courts on May 9, 2012, and again at the hearing before the bankruptcy court on May 17, 2012, falsely claiming Nationstar was the current holder of the note when it knew it was not in possession of the original note on or before those dates. (R. pp. 425-430; 1,180, lines 22-25) In fact, Nationstar had not even contacted Fannie Mae or requested the original note on or before those dates.

If the court had simply followed the law of the case established during the first hearing, as Plaintiff was trying to do, the court would have permitted Plaintiff to add Fannie Mae as a defendant, serve Fannie Mae with the original complaint, grant Fannie Mae at least 30 days to answer prior to proceeding any further in the case, ordered Nationstar to answer some of the outstanding discovery requests Plaintiff was seeking, and eventually, the court would have held an evidentiary hearing to determine the merits of Nationstar's claims upon receipt of Plaintiff's motion seeking such determination.

Instead, the court entertained legal arguments Nationstar did not have standing to raise at the time and issued prejudicial, adverse findings in the Orders entered on February 27, 2013 and on April 9, 2013, which contributed to the adverse findings in the Orders entered on October 9, 2013 and on November 6, 2013. Ironically, Nationstar raised the "law of the case doctrine" argument against Plaintiff in its opposition to her motion to dismiss it from the action. (R. p. 1,034)

Unfortunately, the court ignored the fact that the court had already deviated from

the law of the case set forth during the first hearing. The court ignored that Plaintiff was merely seeking to bring her case back on track and have Nationstar dismissed so it could no longer delay, complicate and prejudice her case with bankruptcy related legal arguments that were not only incorrect and inapplicable to the facts and evidence of the case, but it did not have standing to raise those legal arguments in the first place.

At the first hearing, the court was informed and otherwise made aware of Plaintiff's pending Chapter 13 bankruptcy case and that Nationstar and Plaintiff had appeared before the bankruptcy court on Nationstar's motion for clarification seeking modification of stay to permit it to intervene. The court was obviously not persuaded that the pending Chapter 13 presented any obstacle to Plaintiff proceeding with her state court action and was planning to allow her case to proceed.

At the first hearing, Nationstar explained to the court that Plaintiff was current on her payments, she had not ever been in default in the payment of the loan, she is in a Chapter 13 bankruptcy, and there was no precondition arrearage in her bankruptcy plan. (R. p. 1,227, lines 3-7 & 18-21) In fact, Plaintiff had also informed the court of those facts in her complaint and had attached her Chapter 13 bankruptcy plan and Nationstar's proof of claim as exhibits to her complaint (R. pp. 44-45; 228-257), which means she clearly was not trying to hide anything from the court's consideration with respect to Nationstar's claims and her pending Chapter 13 case.

The court observed at the first hearing that Plaintiff's "residential property, which is the subject matter of this mortgage was not part of the bankruptcy in the beginning" and that Nationstar had obtained the bankruptcy court's permission to appear. (R. pp.

1,227, lines 18-25; 1,228, lines 1-3) The court would not have allowed Plaintiff's case to proceed any further if it did not believe Plaintiff had standing and the right to potentially obtain the declaratory and injunctive relief she was seeking from the court.

Likewise, the court knew the parties had already appeared before the bankruptcy court, and it stands to reason that the bankruptcy court or trustee would have objected or otherwise informed Plaintiff if she did not have standing to proceed with her state case, and they had not done so.

On the contrary, the bankruptcy court's statements at that hearing indicate it likewise believed Plaintiff had standing and the state court could remove the mortgage lien in the event the mortgage and note are declared invalid and unenforceable. (R. p. 753, lines 11-23) Nationstar was aware of the bankruptcy court's statements but argued otherwise to the state court citing to law that is applicable to Chapter 7 debtors and not to Chapter 13 debtors, which confused the state court and resulted in the prejudicial, adverse rulings subject to this appeal.

Nevertheless, since Nationstar did not have standing to dismiss the case or be substituted for other parties at that time, it should have been apparent to the court that Nationstar also did not have standing to oppose and prevent Plaintiff from adding Fannie Mae as a defendant in compliance with the court's statements at the first hearing.

The record shows that Nationstar did not produce any new evidence establishing any specific rights and interests after the first hearing that would justify the court arbitrarily granting Nationstar an exception to the law of the case doctrine and deviating from the law of the case that was established during the first hearing. (R. pp. 1,309-

1,735) Nationstar did not have standing to raise legal arguments in opposition to Plaintiff's motion to amend complaint because the issues of whether Nationstar had any rights and interests independent of Fannie Mae and of whether such rights and interests had been lawfully obtained had not yet been reviewed and determined by the court at an evidentiary hearing.

In consideration of the foregoing, Plaintiff believes the trial court erred in failing to follow the law of the case established during the first hearing, in denying Plaintiff's motion to amend and motion to compel, in granting Nationstar standing to raise legal arguments prior to holding an evidentiary hearing to determine the merits of its claims, in holding Plaintiff did not have standing to bring the action based on law that is applicable to Chapter 7 debtors, and in ignoring the transcript of the bankruptcy court hearing indicating otherwise that Plaintiff produced to the court in her motion for reconsideration of the Orders entered on February 27, 2013, attached as Exhibit B. (R. pp. 746-754)

II. THE TRIAL COURT ERRED IN FAILING TO ACKNOWLEDGE OR DETERMINE WHETHER NATIONSTAR COMMITTED FRAUD OR ILLEGALITY AFFECTING THE INSTRUMENT WHICH BARRED IT AS A MATTER OF LAW FROM OBTAINING THE RIGHTS OF A HOLDER IN DUE COURSE BY VIRTUE OF POSSESSION.

S.C. Code Ann. 36-3-203 (1976), Transfer of instrument; rights acquired by transfer, states in pertinent part [emphasis added]:

> "(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, **but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.** [...]
>
> (d) If a transferor purports to transfer less than the entire instrument,

> negotiation of the instrument does not occur. **The transferee obtains no rights under this chapter and has only the rights of a partial assignee.**
>
> OFFICIAL COMMENTS:
>
> [...] Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under section 3-308 that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it. [...] There is one exception to this rule stated in the concluding clause of subsection (b). **A person who is party to fraud or illegality affecting the instrument is not permitted to wash the instrument clean by passing it into the hands of a holder in due course and then repurchasing it.** [...]
>
> Subsection (d) restates former Section 3-202(3). **The cause of action on an instrument cannot be split. Any indorsement which purports to convey to any party less than the entire amount of the instrument is not effective for negotiation.** [...]"

In consideration of the foregoing excerpts from the Uniform Commercial Code, Chapter 3, Plaintiff contends it is clear that as a matter of law Nationstar was barred from acquiring the rights of a holder in due course by virtue of possession of the instrument after it had intentionally falsely claimed ownership of the instrument before the courts and other interested parties to get what it wanted from the courts and Plaintiff.

Since Nationstar subsequently stated under oath that Fannie Mae is the owner of the note and mortgage, and since Fannie Mae had claimed to have acquired the loan on October 1, 2007 (R. p. 1,025), this means all the rights in the instruments would have been fully resting with Fannie Mae when Plaintiff filed her cases in 2011 and 2012, Nationstar would have been a partial assignee at best, which was never proven and is disputed by Plaintiff. Nationstar refused to produce evidence in discovery that speaks to

that issue, and the court was aware of that.

In fact, in the Order granting Nationstar's motion for summary judgment, the court held at page 8, "Here, by virtue of its possession of the original note, **if the loan were in default**, Nationstar **would be** the proper party to enforce the note." [Emphasis added.] (R. p. 28) In the same Order at page 3, the court quoted an acknowledgement that Plaintiff is current on her payments. (R. p. 23)

In making that statement, the court ignored the fact that no assignment had been recorded at the register of deeds (R. p. 938), and generally, to have standing to foreclose, the trial courts will look at whether the foreclosing party has an assignment of mortgage that was recorded prior to filing the foreclosure action. For example, in Deutsche Bank Nat. Trust Co. v. Heinrich, Civil Action No. 2011-CP-10-1060 (Charleston County Ct. C.P., July 31, 2013), the court granted the homeowners' motion to dismiss finding as follows (R. pp. 1,194-1,197):

> "Plaintiff admits that the assignment of mortgage into Plaintiff was recorded February 23, 2011, about two weeks after this action was filed. Plaintiff claims to have no obligation to record the assignment into itself prior to filing this action. [...] However, *Carpenter v. Longan*, 83 U.S. 271, 16 Wall. 271, 21 L.Ed. 313 (1872), quoted by Plaintiff's counsel in this oral argument and brief, clearly supports the notion that the Plaintiff must clearly own the Note and the Mortgage to foreclose on the property. Plaintiff failed to show that it owned the Mortgage at the time the Complaint was filed. [...]
>
> Our state court of appeals made a recent decision in *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 731 S.E.2d 547 (Ct. App. 2012), '[T]he assignment of a mortgage does not need to be recorded, and failure to do so has no effect on the rights of the assignee.' *Id.* at 623. However, I distinguish the facts of *Kinder* from this case as the Assignment of Mortgage in *Kinder* was after the foreclosure was already complete and the issue at dispute in that case was the surplus funds going to the Assignee. Filing is not the issue but ownership of the note.
>
> It is clear that to have standing in this foreclosure case, Plaintiff

must not only be the holder and owner of the original Note, but also the Mortgage as well. Plaintiff's Complaint in this case fails to meet this criteria. Plaintiff lacks the standing to initiate and prosecute the foreclosure, and dismissal pursuant to Rule 17(a) and Rule 12(b)(6) SCRCP is appropriate."

Similarly, in Nationstar Mtge., L.L.C. v. Van Cott, 2012-Ohio-5807 (Ct. App. 2012), the court held as follows (R. pp. 1,067-1,068):

"The Ohio Supreme Court resolved this issue in its recent decision on appeal in the *Schwartzwald* case. *Federal Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017. The decision was issued after the parties submitted their briefs in this appeal. The court held in the case that a party bringing an action in foreclosure must establish an interest in the note and mortgage at the time it filed suit for it to have standing to invoke the jurisdiction of the common pleas court in the case. Id. at ¶ 28. **The court held that lack of standing at the commencement of a foreclosure action cannot be cured by subsequently obtaining an interest in the subject of the litigation.** Id at ¶ 39. Under the decision, 'lack of standing at the commencement of a foreclosure action requires dismissal of the complaint * * * without prejudice.' Id. at ¶ 40. [...]

In our view the conclusory statement in affidavits that Nationstar was entitled to enforce the note at the time the complaint was filed, without more, failed to meet Nationstar's burden on motion for summary judgment to establish the absence of a genuine issue of material fact on whether it owned or was otherwise entitled to enforce the note at the time of filing of the complaint. [...] On these facts it cannot be stated that it is undisputed that Nationstar owned the note or was otherwise entitled to enforce the instrument at the time it filed the foreclosure complaint. We find merit to appellants' contention that the trial court erred by granting Nationstar's motion for summary judgment." [Emphasis added.]

During the first hearing in Plaintiff's case, after the court stated, "You just sued Old South Mortgage Corporation", Plaintiff stated to the court as follows:

"That's right. Because, really, the crux of what I'm getting at is that here, you know, Flagstar was just the servicer. They didn't lend me the money, and Old South had admitted that in their answer. Flagstar was not the lender either. Flagstar at all times, and according to everything that's out there that I've produced to this Court, Flagstar was just a servicer. So how can a servicer that has no interest in equity have the ability to transfer what it doesn't have?

> And that's been my argument why these documents are all sham. I mean, basically, we started at the top with this sham. Old South wasn't the lender, didn't have equitable interest in my property. And then we start with the sham that they stamped it 'Pay to the order of Flagstar.' Well, Flagstar didn't lend either. And now, they want to continue the sham by, 'Okay, here's a blank endorsement by Nationstar saying, 'Okay, well, now it's yours.' And they slip all this under the table and they don't record anything at the county.
>
> And it's true that in South Carolina, you do not have to record assignments. However, according to, you know, the law, in order to be valid, it must be recorded. Otherwise, how can the Court decide the parties' interest?" (R. pp. 1,233, lines 6-25; 1,234, lines 1-3)

Plaintiff submits the foregoing to this Court with an appeal to set a precedent in South Carolina similar to the precedent set in Ohio for the protection of the public that in order to have standing to litigate an action on a mortgage, the party claiming ownership must prove it was the owner or had acquired all the rights prior to the date the action was filed and cannot acquire the rights after the fact while the mortgage is under litigation.

Financial institutions should not be permitted to in essence convert the title of Plaintiff's home into a casino chip or credit card account to be passed around from one party to another like a hot potato with no valid public record at the register of deeds to help her figure out if anyone has any legal rights and interests and, if so, when and from whom they were obtained.

Plaintiff should not have to perform extensive research and file a lawsuit to discover who owns the mortgage and should not be subjected to multiple and fraudulent claims of ownership because nothing is recorded at the register of deeds to stop that from happening, which is the way crooked companies like it. That is unacceptable, and Plaintiff never knowingly and intentionally agreed to that. This is Plaintiff's home and there should be a much higher standard of care and recording requirements to protect her

from multiple and fraudulent claims of ownership of a mortgage against her home.

If a party does not want to record an assignment at the register of deeds to protect its interest in the property, Plaintiff does not object to the law being flexible as to not requiring that party to record an assignment. However, Plaintiff appeals to this Court to not further water down the state's recordation laws through case law because that will leave the public vulnerable to multiple and fraudulent claims of ownership of mortgages against their real property in this state. The scales of justice should be tipped so that property owners will also receive equal protection under the state's recordation laws.

The original intent of the South Carolina legislature in enacting Title 30, Public Records, Chapter 7, Recordation Essential to Validity, of the South Carolina Code of Laws was obviously to require that mortgage liens be recorded at the public register of deeds for the protection of the public and to encourage recordation of mortgage assignments by in essence warning an assignee may potentially forfeit its interest to a subsequent creditor or purchaser if an assignment is not recorded. (R. pp. 40; 436-437)

Generally, a recorded assignment constitutes actual notice of an assignee's interest in the property, and if there is no recorded assignment, how can anyone know for certain whether there has ever been a lawful transfer of the mortgage? Why should an interested party be required to sue one or more parties where it is unclear whether any other party has a lawful interest in the property? Is it not fair to say the burden should be on the assignee to record an assignment so as to publicly notify all interested parties of its interest in the property? Is it not fair to say the burden should not be shifted to homeowners and other interested parties to try to figure out whether there has ever been a

lawful transfer of the mortgage?

In fact, if an assignment is not recorded on or before the date an action on a mortgage is filed, the state legislature granted the courts the authority to cancel the mortgage, regardless of whether there may be an unknown party somewhere who may claim to own it, and the court's order shall be binding. Plaintiff had cited to the two most relevant statutes evidencing that fact in her memorandum in support of her motion for summary judgment as follows. (R. p. 436)

In S.C. Code Ann. 29-3-430 (1976), Order to cancel mortgage or release lien upon failure to show sufficient cause, it states, in pertinent part:

> "If the parties so served with the petition and rule [...] shall fail to show sufficient cause and the court or judge shall be satisfied [...] that the lien of the mortgage has been released, discharged or extinguished, the court or judge shall thereupon, by an appropriate order, direct the proper officer to satisfy and cancel the mortgage or the record thereof or to release the lien of the mortgage upon the record thereof, as the case may be."

In S.C. Code Ann. 29-3-440 (1976), Persons on whom satisfaction by order of court is binding, it states:

> "Such satisfaction and cancellation of the mortgage or release of the lien thereof shall be effectual and binding upon the parties so served with the petition and rule **and upon every assignee or pledge of every parol or written assignment, pledge or hypothecation of such mortgage not named in and served with the petition and rule unless such pledge, hypothecation or assignment is duly recorded in the proper office at or before the time of the filing of the petition** or the petitioner has actual notice or knowledge thereof." [Emphasis added.]

In Plaintiff's case, the court in effect acknowledged that the entire interest in the instruments had not been transferred to Nationstar because such transfer is contingent upon a default that had not occurred. In finding that Nationstar is the servicer, the court

ignored that Plaintiff had also raised a dispute and produced evidence indicating Fannie Mae may not have intended or expressly authorized Nationstar to become the servicer because Flagstar was reportedly only supposed to transfer delinquent loans to Nationstar at the time it transferred Plaintiff's account to Nationstar for servicing in late 2009. Since her account was current, Plaintiff believes Flagstar sent her account to Nationstar in error, and they did not report or correct the error. (R. pp. 888-889; 940)

Plaintiff finds this fact significant because she suspects Nationstar had not been sending her payments to Fannie Mae, and Fannie Mae would not necessarily have been expecting her payments assuming her account was in default because Flagstar had sent her account to Nationstar for servicing. Nationstar could have put that concern to bed last year, and instead, Nationstar refused to disclose in its discovery responses whether it had sent her payments toward principal and interest to Fannie Mae or whether it had kept all or a percentage of such payments for its own profit. (R. pp. 1,311-1,313)

This is important because it speaks to the fact that Plaintiff had never knowingly and intentionally granted her informed consent to any party other than the owner of the instruments being the primary beneficiary of her payments toward principal and interest on the note. At all times prior to filing her complaint, Plaintiff voluntarily made her payments to the companies who claimed to be the servicers of the loan, first to Flagstar and then to Nationstar, believing the owner of the instruments would be the primary beneficiary of such payments.

However, when Plaintiff discovered the owner of the instruments probably had not been receiving such payments since Nationstar had falsely claimed ownership of the

instruments, she filed her action seeking protection, justice and relief from the court. The record shows Plaintiff made the court aware of that, which the court ignored. (R. pp. 897-898)

In Plantation Fed. Bank v. Gray, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013), this Court determined that since the trial court had bifurcated the legal claims of the parties into separate trials, Gray's compulsory legal counterclaims of breach of contract, breach of fiduciary duty, fraud, violations of the South Carolina Unfair Trade Practices Act, and tortious interference with economic opportunities must be tried and adjudicated first before the bank's foreclosure action on the subject vacant lot may proceed. The bank failed to persuade this Court that there were imperative circumstances or a threat of irreparable harm that would justify infringing on Gray's constitutional right to a trial by jury on her counterclaims.

The foregoing case is a recent example showing that the courts generally favor allowing a party to litigate her claims and receive a judgment based on the merits before she suffers the losses she is seeking to avoid. Had this Court agreed with the master-in-equity's ruling, Gray would have most likely lost the property in foreclosure because her counterclaims had been bifurcated and were not going to be heard during the foreclosure proceeding. Gray had obviously filed her counterclaims seeking to avoid losing the property in foreclosure, and therefore, in order to do justice, her counterclaims had to be tried and adjudicated first.

Plaintiff finds herself in a similar dilemma in her case in that the trial court ignored the law, facts and evidence she presented, flat out refused to acknowledge them

and make a ruling regarding Nationstar's apparent fraud or illegality affecting the instrument and being a partial assignee at best on or before the dates she filed her cases.

The court should have ruled upon that evidence first instead of setting it aside and ignoring it because if Nationstar could not acquire the rights of a holder in due course as a matter of law under the UCC, Chapter 3, then Nationstar did not have standing to raise the legal arguments that the court used to prejudice and deny Plaintiff's right to a trial and adjudication of her claims against the originator of the mortgage on the merits.

Nationstar was not a party to the origination, it has no independent knowledge of what occurred at the closing on the purchase of Plaintiff's home, and it has introduced what amounts to hearsay or speculation about what happened there. Meanwhile, the responsible parties who were involved in the origination are not doing much of anything in defense of Plaintiff's action, which she finds quite unfair.

An owner of the instruments was identified before the court, and there was no concrete evidence before the court that the owner had transferred all its rights in the instruments to Nationstar prior to Plaintiff filing her cases. In consideration of the foregoing, Plaintiff believes the trial court erred in failing to acknowledge or determine whether Nationstar committed fraud or illegality affecting the instrument which barred it as a matter of law from obtaining the rights of a holder in due course by virtue of possession after Plaintiff had filed her cases in the courts.

III. THE TRIAL COURT ERRED IN FAILING TO FIND NATIONSTAR LACKS STANDING TO DEEND THE ACTION AS A MATTER OF LAW.

In Powell v. Bank of Am., 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008), this Court found that the intervening bank admitted it has no ownership interest in the

interpleaded funds, the bank is not aggrieved by the trial court's apportionment of the funds between Cody and Elizabeth, the bank did not have standing, and so this Court dismissed the bank's appeal. This Court found as follows:

> "Standing refers to a "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary 1413 (7th ed. 1999). "Standing is . . . that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." 1A C.J.S. Actions § 101 (2005). It concerns an individual's "sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court." Id.
>
> Standing is comprised of three elements:
>
> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
>
> Smiley v. South Carolina Dep't of Health & Envt'l Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (alteration in original)). "The party seeking to establish standing carries the burden of demonstrating each of the three elements." Sea Pines Ass'n for the Protection of Wildlife, Inc. v. South Carolina Dep't of Natural Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).
>
> "As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation." Ex parte Morris, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006). "One must be a real party in interest, *i.e.*, a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." Id."

Similarly in Plaintiff's case, third party Nationstar did not meet the conditions or requirements outlined above in Powell in a manner that justified granting it standing to raise legal arguments in defense of Plaintiff's action against Old South.

First of all, Nationstar refused to disclose whether it had paid any consideration when it obtained Plaintiff's account for servicing. (R. p. 1,311) Since Nationstar does not own the mortgage, it did not purchase the mortgage, so it stands to reason Nationstar probably either paid no consideration or it paid an insignificant amount (i.e., $1.00). Likewise, Nationstar refused to answer Plaintiff's interrogatory intended to determine how it is compensated and whether it would suffer any significant financial loss if Plaintiff paid off the mortgage today. (R. pp. 1,312-1,313)

Since Nationstar was the intervening party claiming an interest in the instruments, it was Nationstar's responsibility to explain to Plaintiff and the court what interest it had and how it might be harmed if Plaintiff is granted the relief she is seeking, which Nationstar refused to do and Plaintiff brought that to the court's attention in her pleadings. (R. pp. 893-894; 918-936) Therefore, Plaintiff contends the court should have assumed that Nationstar did not pay any consideration, it did not have an interest in equity and therefore would not be harmed if the court grants Plaintiff the relief she is seeking.

The note and mortgage do not belong to Nationstar. Plaintiff's payments toward principal and interest do not belong to Nationstar. Plaintiff's funds in escrow for the payment of taxes and insurance do not belong to Nationstar. Therefore, Nationstar is not the real party in interest with a personal stake in the subject matter of the litigation.

Nationstar is not a party who has a real, material, or substantial interest in the subject matter of the action, but it is a third party who has only a nominal interest because Nationstar refused to prove otherwise when given the opportunity to do so in discovery.

In addition, since Nationstar's alleged interest is contingent upon a default on the mortgage, the interest is not actual or imminent, but it is conjectural. Plaintiff may never have defaulted, she may have refinanced with another company, she may have paid it off early, or Nationstar may never acquire its alleged interest upon default for other reasons.

In consideration of the foregoing, Plaintiff believes the trial court erred in failing to find Nationstar lacks standing to defend the action as a matter of law and in denying Plaintiff's motion to dismiss Nationstar from the action with prejudice.

IV. THE TRIAL COURT ERRED IN FINDING PLAINTIFF LACKS STANDING TO BRING THE ACTION.

Nationstar's allegation that Plaintiff lacks standing to bring a declaratory judgment action in state court was incorrect because the federal authorities Nationstar cited in support of their position involve Chapter 7 debtors and are inapplicable to Chapter 13 debtors who have filed a bankruptcy case. Since Plaintiff is a Chapter 13 debtor in possession of the property in the bankruptcy estate, she has standing. (R. pp. 952-953)

The U.S. District Court, District of South Carolina held In Re Lee, 432 B.R. 212, 2010 U.S. Dist. LEXIS 44965 (D.S.C. 2010) in pertinent part:

> "Debtor argues that she has the ability to pursue litigation on behalf of the bankruptcy estate. That proposition is not particularly controversial. Though the Fourth Circuit has not yet considered the issue, each circuit to have considered it has found that **Chapter 13 debtors have standing to bring claims in their own name on behalf of the bankruptcy estate.**

See, e.g., Smith v. Rockett, 522 F.3d 1080, 1081 (10th Circ. 2008); Crosby v. Monroe County, 394 F.3d 1328, 1331 n.2 (11th Cir. 2004); Cable v. Ivy Tech State College, 200 F.3d 467, 474 (7th Cir. 1999) (ADA claim); Olick v. Parker & Parsley Petroleum Co., 145 F.3d 513 (2d Cir. 1998)(class action fee application). **If the pursuit of litigation in the name of the estate was all that Debtor sought, there would be little issue with her chosen course.**" [Emphasis added.]

The Tenth Circuit held in Smith v. Rockett, 522 F.3d 1080, 1081 (10th Circ. 2008) in pertinent part:

"Rule 6009 of the Federal Rules of Bankruptcy Procedure also supports the conclusion that the Chapter 13 debtor has standing to bring a civil complaint: 'With or without court approval, the trustee *or debtor in possession* may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.' *Fed. R. Bankr. P. 6009* (emphasis added). We recognize that 'debtor in possession' is a term of art found only in the Chapter 11 context. **However, 'the Chapter 13 debtor has been considered analogous to Chapter 11, which grants the debtor full authority as representative of the estate typical of a trustee.'** *Cable, 200 F.3d at 472* (citation omitted); *see Champion v. Credit Bureau Servs., 206 F.R.D. 663, 669 (E.D. Wash. 2001).* **We find this authority persuasive. We therefore hold that Plaintiff, as a Chapter 13 debtor, had standing to file this complaint on behalf of the bankruptcy estate.**" [Emphasis added.]

On or about May 29, 2012, Plaintiff filed amended schedules, including an amended Schedule C in her Chapter 13 bankruptcy case reporting the state court action valued at $1.00 as exempt property since she made no claim for an award of monetary damages against any party. (R. pp. 839-849) Since no one filed an objection within 30 days, the state court action is now exempt from the claims of her creditors. Schwab v. Reilly, 130 S.Ct. 2652, 2657 (2010). Since the time for filing an objection has expired, the action is now exempt property of Plaintiff, the trustee was notified and expressed no objection or interest in it within 30 days; consequently, the trustee has in effect

abandoned the action to Plaintiff, Plaintiff does not need the trustee's permission to prosecute or resolve the action, and the trustee obviously has no interest in the action or he would have objected or intervened long before today.

Plaintiff did not file an action in federal court claiming to have the same strong-arm avoiding powers of the Chapter 13 trustee under Title 11 of the U.S. Code by her own personal proclamation and decree; therefore, Plaintiff contends those federal statutes and related federal cases are irrelevant and inapplicable to her state case.

If it were true that only the trustee has the power to avoid transfers of property or liens of the Chapter 13 bankruptcy estate, the Chapter 13 debtor would be statutorily barred from defending the bankruptcy estate and herself against a foreclosure in state court and would have no defense if the trustee refused to appear and defend. If we follow Nationstar's faulty logic, the Chapter 13 debtor/defendant in a foreclosure action would be statutorily barred from raising defenses or counterclaims seeking substantially the same end result as Plaintiff is seeking in her case, which is an absurd proposition. Consequently, Chapter 13 debtors generally have standing to take legal action to protect or defend their interests in the property of the estate, which is in their possession and usually exempt from the claims of their unsecured creditors any way.

In fact, at the hearing on Nationstar's Motion for Clarification on May 17, 2012, Judge Waites, the chief bankruptcy judge presiding over Plaintiff's Chapter 13 case, acknowledged before the trustee's counsel, Nationstar's counsel, Plaintiff and her counsel that the state court can remove the lien, that he is happy for Plaintiff to remove it wherever she wants to do it, and that he was not looking to do the work. (R. p. 753, lines

11-23) Nationstar ignored what Judge Waites said at the clarification hearing and proceeded to misrepresent and misapply federal statutes and federal cases before the state court to have Plaintiff's action dismissed prematurely.

In consideration of the foregoing, Plaintiff believes the trial court erred in finding Plaintiff lacks standing to bring the action in its Orders entered on February 27, 2013 and on April 9, 2013, which prejudiced her case and resulted in its premature dismissal.

V. THE TRIAL COURT ERRED IN FINDING PLAINTIFF'S CAUSES OF ACTION ARE BARRED BY JUDICIAL ESTOPPEL.

Plaintiff's confirmed Amended Chapter 13 Plan states in pertinent part:

> " IV. [...] Confirmation of this plan does not bar a party in interest from objecting to a claim. [...]"
>
> "V. [...] The debtor is responsible for protecting the non-exempt value of all property of the estate and for protecting the estate from any liability resulting from operation of a business by the debtor. Nothing herein is intended to waive or affect adversely any rights of the debtor, the trustee, or party with respect to any causes of action owned by the debtor." (R. pp. 254; 256)

Consequently, Plaintiff cannot be estopped from actually litigating her claims when the plain meaning of the foregoing language in her Amended Chapter 13 Plan is applied.

In Royal v. R&L Carriers Shared Servs., L.L.C., Bank. L. Rep. (CCH) P82,479, 2013 WL 1736658 (E.D. Va., April 22, 2013), the company moved to dismiss Royal's employment discrimination action because he had filed for bankruptcy in late 2009 and did not disclose to the bankruptcy court that he had filed a discrimination charge with the Equal Employment Opportunity Commission in January 2009 or that he had filed a lawsuit arising from the same matter in 2012.

In addition, the company argued that the bankruptcy trustee has exclusive

standing to sue on Royal's claims because of his earlier non-disclosures. Royal, a Chapter 13 debtor whose bankruptcy action was still pending at the time, had reported his pending action in district court to the bankruptcy court as a contingent asset in an amended schedule filed on January 31, 2013, and the bankruptcy trustee had not expressed an objection to the amended schedule. Consequently, the court held,

> "The Court denies the motion to dismiss because the plaintiff, as a debtor in possession pursuant to Chapter 13 of the U.S. Bankruptcy Code, maintains standing to bring civil actions in court. Additionally, **the Court finds that the bankruptcy court did not 'accept' the plaintiff's position that he had no legal claims against the defendant, for the bankruptcy court has yet to grant the plaintiff relief or close his bankruptcy action. Thus, the defendant fails to establish one of the factors critical to a judicial estoppel determination, namely that a court must accept the plaintiff's prior inconsistent position.** For these reasons, the Court denies the motion and allows the action to proceed. [...]
>
> Moreover, in light of Bankruptcy Rule 6009's language that a debtor in possession may appear 'before any tribunal' 'with or without court approval,' Royal's lack of disclosure on his bankruptcy schedule does not appear to undermine his standing in the instant suit. In sum, Royal has standing to pursue this action." [Emphasis added.]

In Plaintiff's case, unlike in Royal's case, her pleadings show she did not personally know or suspect she had any valid causes of action arising from the mortgage before she filed her bankruptcy case and schedules in April 2011, and she did not discover her causes of action until late 2011, months after her Amended Chapter 13 Plan was confirmed in June 2011.

Plaintiff further explained in her pleadings that she discovered her causes of action as a result of Nationstar's servicer abuses in unreasonably refusing to reinstate her billing statements and online account access unless she sends it evidence she had reaffirmed the debt in the bankruptcy court. That was the red flag event that prompted

her to investigate and discover her causes of action arising from the mortgage. (R. pp. 47-48; 50; 267-274; 324-329; 499-500; 900-901; 955; 1,004-1,005)

The court ignored all of that, and in the Order granting Nationstar's motion for summary judgment, the court decided to bind Plaintiff to facts her closing attorney allegedly knew that were not disclosed to Plaintiff to support the court's finding that Plaintiff's causes of action are barred by *judicial estoppel* because she had failed to report in her initial bankruptcy filings potential claims that she did not personally know existed at that time. How could Plaintiff possibly conceal what she did not know at that time?

Nevertheless, even if, for the sake of argument, Plaintiff knew she had potential causes of action arising from the mortgage before filing her initial bankruptcy filings, the Royal case establishes that Plaintiff's failure to report a potential claim in her initial bankruptcy schedules does not mean her claim is automatically barred by *judicial estoppel* or that she lacks standing to bring the claim.

On the contrary, the Royal case establishes that Plaintiff's claim cannot be barred by *judicial estoppel* because the bankruptcy court did not accept Plaintiff's prior position that she had no legal claims because the court has yet to grant her final relief or close her bankruptcy action. Thus, Nationstar failed to establish one of the factors critical to a *judicial estoppel* determination, namely that a court must accept Plaintiff's prior inconsistent position.

In fact, Plaintiff filed amended bankruptcy schedules reporting her pending state court action in late May 2012, which was only a few weeks after the state case had been filed. (R. pp. 839-849) The trustee has not objected to Plaintiff's amended schedules, and

Plaintiff can amend her schedules again in the future, if necessary, to report material changes while her bankruptcy action is pending.

Plaintiff knows that she is required to timely report material changes in her finances or property interests to the bankruptcy court. She reported the state case before any material change occurred, so clearly, her creditors suffered no harm. Therefore, it is irrelevant that Plaintiff reported the state case to the bankruptcy court a few weeks after it was filed, and it is certainly not evidence that she had ever intended to conceal anything from the bankruptcy court that she has a duty to report. She did not.

There are other reasons why Plaintiff contends she cannot be estopped from bringing her causes of action as follows. The trial court ignored Plaintiff's citation to the doctrine of *ultra vires* and citations to cases holding that the parties to an illegal contract cannot ratify it and therefore cannot be estopped from arguing its invalidity. (R. pp. 1,049-1,058)

The Supreme Court of South Carolina in Howard & Foster Co. v. Citizens' Nat'l Bank, 133 S.C. 202, 130 S.E. 758 (1926) cited and explained the doctrine as follows:

> "In *Central Co. v. Pullman*, 139 U.S. 24 at page 59; 11 S. Ct. 478, 488 (35 *L. Ed.* 55), the Court sums up the question thus: 'A contract of a corporation, which is ultra vires, in the proper sense (that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature), is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. **The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.'**
>
> The Court proceeds to show that there can be no estoppel upon the corporation to set up the defense of ultra vires; that, while it may be estopped from urging the lack of certain formalities which might have

been observed--**'but when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws.'** ***Central Co. v. Pullman*, 139 U.S. 24 at page 60; *11 S. Ct. 478, 488 (35 L. Ed. 55)*.**

In *Penn. R. Co. v. St. Louis R. Co.*, 118 U.S. 290, *6 S. Ct. 1094; 30 L. Ed. 83*, the Court said, 'But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the Court, can infuse any vitality into it.' [...]

In *Penn. Co. v. R. Co.*, 118 U.S. 290, *6 S. Ct. 1094; 30 L. Ed. 83*, it is held (quoting syllabus):

'The doctrine is sound that when acts have been done and property has changed hands under void contracts which have been fully executed, Courts will not interfere; **but relief in such cases must be based on the invalidity of the contract, and not in and of its enforcement.**'" [Emphasis added.]

Consequently, rather than ignoring the substantial evidence Plaintiff had submitted showing the mortgage contract is void and of no legal effect as a matter of law pursuant to the doctrine of *ultra vires* and other laws cited in her pleadings, the trial court should have ruled upon Plaintiff's evidence and such laws first rather than ignoring it all under a presumption that her causes of action were automatically barred by *judicial estoppel* and *res judicata* just because Nationstar said so. The court also ignored that Nationstar had cited federal court opinions with different facts than were presented in Plaintiff's case, with the most obvious difference being Plaintiff had never defaulted and the debtors in those cases had defaulted on making their payments.

In a similar vein, in Rose v. Harllee, 69 S.C. 523, 48 S.E. 541 (1904), the South Carolina Supreme Court held as follows:

"The mortgagee's position that the mortgagor was estopped from denying the mortgage's validity by accepting benefits under it could not be sustained because to hold that it could be defeated by estoppel would be to allow individual action to defeat public policy.

[...]

> The right to contract is not absolute and unlimited, but is subject to such restrictions as the legislature may impose, provided such restrictions can be reasonably considered to be for the public safety, health, or morals. **Neither the Constitution of the United States nor that of South Carolina forbids the General Assembly to pass laws regulating the substance of contracts, the form in which they shall be made, and the manner of execution and attestation, if the regulation tends to protect the public or a class of individuals from fraud or unfair dealing.** This proposition is so well established in both reason and authority that discussion is unnecessary. **Examples are found in the statute of frauds,** in the requirement that two witnesses shall attest a deed of real estate, and in the statutes against usury, and against dealing in various commodities on options and margins." [Emphasis added.]

In her pleadings, Plaintiff also cited to the state's statute of frauds, S.C. Code Ann. 32-3-10 (1976), and explained that the giver of the funds at the closing was not disclosed to her and therefore had not obtained her informed written consent to lend to her and be repaid for a loan or hold a lien against her home, which prejudiced her consumer right of choice between lenders and loan products (conventional loan vs. government guaranteed loan). (R. p. 903)

The court ignored the evidence and law showing that the instruments that exist were obviously falsified, slandered and defaced and her signature and payments were obtained under false pretenses, all of which indicate no valid contract exists in writing signed by Plaintiff upon which any party can lawfully bring a cause of action against her in the courts of this state. That being the case, how could Nationstar lawfully intervene and argue Plaintiff is estopped from bringing her action seeking a declaration that the mortgage and note are invalid as a matter of law?

Prior to prejudicing Plaintiff's rights and subjecting her to potential liability for Nationstar's attorney fees and costs, the court should have made rulings on whether a

valid contract exists and on whether there had ever been any lawful transfers of the mortgage first, but the court refused to do so and instead granted Nationstar everything it wanted and ignored Plaintiff as if nothing she had to say mattered one iota.

In consideration of the foregoing, Plaintiff believes the trial court erred in finding Plaintiff's causes of action are barred by *judicial estoppel.*

VI. THE TRIAL COURT ERRED IN FINDING PLAINTIFF'S CAUSES OF ACTION ARE BARRED BY RES JUDICATA.

In In Re Nix, CA 10-01103-HB, 2012 WL 27667 (Bankr. D.S.C., Jan. 5, 2012), which the court had cited in the Order granting Nationstar's motion for summary judgment, the opinion states in pertinent part:

> "In order for *res judicata* to apply, three conditions **must be** satisfied: 1) the prior judgment was final and on the merits, and rendered by a court of competent jurisdiction in accordance with the requirements of due process; 2) the parties are identical, or in privity, in the two actions; and 3) the claims in the second matter are based upon the same cause of action involved in the earlier proceeding.
>
> *First Union Commercial Corp. v. Nelson, Mullins, Riley and Scarborough (In re Varat Enters., Inc.)*, 81 F.3d 1310, 1315 (4th Cir. 1996) (citations omitted)." [Emphasis added.]

As to the bankruptcy court's finding In Re Nix that,

> "[T]his catch-all reservation of rights clause [in the bankruptcy plan] does not allow Plaintiff to avoid the post-confirmation preclusive effects of *res judicata* and § 1327(a) on her debtor/creditor relationship with HFC,"

but the court also cautions in the footnote as follows:

> "This determination is based on a fact-specific *res judicata* analysis and the Court reserves comment on the effect of a general reservation such as this on any other party or parties that are not mutually bound by a confirmed plan."

The evidence shows Nationstar falsely claimed to be the creditor in its bankruptcy

proof of claim instead of reporting the name of the actual creditor in that block of its Form 10, and Nationstar was not and knew it was not the actual secured creditor on or before the date Plaintiff filed her bankruptcy case. Plaintiff believes the UCC, Chapter 3, is clear that Nationstar cannot lawfully become the secured creditor after making a false claim of ownership of the instrument to get what it wanted from the courts and Plaintiff.

Since neither Fannie Mae nor Old South were identified as the secured creditor in Plaintiff's Amended Chapter 13 Plan, and since Fannie Mae and Old South are time barred from submitting a proof of claim against Plaintiff in the bankruptcy court, the doctrine of *res judicata* does not apply to bar Plaintiff's pending case against Old South, the defendant she sued in the first place who is the only lien holder of record that is acknowledged by the register of deeds.

In fact, since the Plan is not a final order, since objections to claims can be filed and considered by the bankruptcy court after the Plan's confirmation, and since the Plan can be amended during the four-year term of the case, it does not constitute a final order adjudicating all matters or issues that may arise between the parties during the term of the case, which will end in April 2015.

It is improper to try to subsequently change the clear meaning of the language and intentions of the parties as stated in the Plan after it is signed and confirmed. The Plan is clearly intended to reserve and not waive or adversely affect causes of action owned by the debtor or impede the debtor's right to object and actually litigate claims. No reasonable person would sign a Chapter 13 plan if that means a creditor will be allowed to get away with filing a fraudulent claim against a debtor who had acted in good faith

because the bankruptcy court is always going to bar the debtor from disputing and litigating claims on the grounds of *judicial estoppel* and *res judicata*. Such a proposition is not only unfair, but it is unconstitutional as well.

It is important for this Court to consider that the bankruptcy court is a trial court, and that the bankruptcy court renders judgments like these on a case-by-case basis. The distinguishing facts of In Re Nix are as follows. Household Finance Corporation ("HFC") was the lender identified on the note and mortgage Nix signed on May 6, 2005, HFC was apparently the actual secured creditor on or before the date Nix filed for bankruptcy, and Nix had agreed to repay the arrearage HFC claimed she owed as part of her Chapter 13 plan.

In Plaintiff's case, Nationstar was not the original lender identified on the note and mortgage, Nationstar was not the secured creditor and was not in possession of the note on the date Plaintiff filed her bankruptcy case, and since there was no arrearage, for all intents and practical purposes, the home and Nationstar are considered exempt.

It is mentioned in the Plan that Plaintiff will pay Nationstar directly so that everyone will know she is paying a mortgage and the trustee will not be paying Nationstar anything out of the monthly payments that Plaintiff makes to the trustee. That reference is not intended and does not waive or adversely affect Plaintiff's causes of action against creditors who are not mentioned in the Plan and does not preclude her from amending the Plan and her bankruptcy schedules each time there is a material change to report. In other words, absolutely nothing is set in stone until the final order is entered granting Plaintiff relief and closing her bankruptcy action, so how can her Plan possibly

be *res judicata* while her bankruptcy action is still pending?

Plaintiff believes the bankruptcy courts wish to discourage what they perceive to be frivolous objections and adversarial proceedings between debtors and creditors as one possible explanation why the courts have sometimes held a debtor's claim is barred by *judicial estoppel* and *res judicata* notwithstanding the foregoing. However, that does not mean that such rulings were fair or lawful in light of the three conditions that generally must be satisfied in order for *res judicata* to apply to bar a party's claims.

Arguably, and older case law lends support to this, the *res judicata* effect of a Chapter 13 plan should only apply as to the creditors whose debts are discharged when the final order is entered granting the debtor relief and closing the case. It is fair to say r*es judicata* should never be applied to unfairly prejudice Chapter 13 debtors' claims in some cases for the purpose of discouraging other Chapter 13 debtors from filing their claims while their bankruptcy cases are still pending. That would be antithetical to years of jurisprudence across the country supporting the citizens' constitutional right to actually litigate their claims and receive rulings on the merits.

In consideration of the foregoing, Plaintiff believes the trial court erred in finding Plaintiff's causes of action are barred by *res judicata* and in granting premature summary judgment dismissal of her case.

VII. THE TRIAL COURT ERRED IN FAILING TO ACKNOWLEDGE OR DETERMINE WHETHER NATIONSTAR PRODUCED INSUFFICIENT EVIDENCE TO SUPPORT THE DECISIONS TO GRANT NATIONSTAR'S MOTION FOR SUMMARY JUDGMENT AND TO DENY PLAINTIFF'S MOTION TO DISMISS NATIONSTAR.

The trial court ignored the fact that Nationstar had not produced an affidavit or

deposition testimony or any other concrete evidence of what Plaintiff's closing attorney knew or believed regarding what took place at the closing before Plaintiff signed the instruments in question. Based on what amounts to Nationstar's speculation, the court decided to bind Plaintiff to facts her closing attorney allegedly knew but had not disclosed to Plaintiff in determining *judicial estoppel* bars her claims. However, what specifically Plaintiff's attorney knew or believed before Plaintiff signed the closing documents should have been established by concrete evidence, not by mere speculation, if the court was going to bind Plaintiff to that to justify dismissing her case.

Obviously, if Plaintiff's closing attorney had discovered certain facts after all the documents are already signed and the closing is over, that is irrelevant. What is relevant is what Plaintiff's closing attorney knew or believed before Plaintiff signed the documents because that is the only opportunity she had to advise against signing the documents if she was aware of any fraud or illegality taking place. (R. pp. 866; 1,105-1,108) Since Plaintiff does not know for sure what her closing attorney knew or believed before Plaintiff signed the documents, how could Nationstar or the court possibly know that for sure? In any event, what is most relevant is what Plaintiff personally knew or believed when she signed the documents, which is explained in her pleadings.

In the order granting Nationstar's motion for summary judgment, the court cited Rule 56(c), SCRCP and Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011) in holding that:

> "Summary Judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no issue of material fact such that the moving party must prevail as a matter of law. [...] When determining whether any triable issues of fact exist, the evidence and all

reasonable inferences must be viewed in light most favorable to the non-moving party."

The record shows there are genuine issues of material fact that are in dispute, including the fact the defendants denied most of Plaintiff's allegations in their answers. (R. pp. 420-424; 653-673) There is currently insufficient evidence to fairly or accurately resolve those issues in Nationstar's favor because, when determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in light most favorable to Plaintiff, the non-moving party.

Nationstar did not serve any discovery requests and refused to completely answer Plaintiff's discovery requests. (R. pp. 1,309-1,735) Consequently, Nationstar produced insufficient evidence in support of its claims and contentions, and it is not entitled to summary judgment as a matter of law.

In consideration of the foregoing, Plaintiff believes the trial court erred in failing to acknowledge or determine whether Nationstar produced insufficient evidence to support the decisions to grant Nationstar's motion for summary judgment and to deny plaintiff's motion to dismiss Nationstar from the action with prejudice.

VIII. THE TRIAL COURT ERRED IN FAILING TO ACKNOWLEDGE OR DETERMINE WHETHER BIFURCATION OF ISSUES WOULD PERMIT PLAINTIFF'S ACTION TO PROCEED TO JUDGMENT ON THE MERITS AS TO WHETHER ILLEGAL ACTS RENDER THE NOTE AND MORTGAGE INVALID AND UNENFORCEABLE AS A MATTER OF LAW.

The court held in its Order granting Nationstar's motion for summary judgment that Plaintiff's fraud claims are barred for failure to establish damages. The court ignored Plaintiff's explanations regarding her damages, complaints and concerns in her pleadings.

She has been defrauded by predatory loan servicers that have abused her and prejudiced her consumer rights. She has a clouded property title because she is subject to multiple and fraudulent claims of ownership of a mortgage against her home due to the present state of the instruments subject to the action. She believes the mortgage against her home is invalid as a matter of law and not legally transferable to any party, which requires a court order to resolve. Theft of her money under false pretenses is also damages, and she wants to prevent that problem from recurring, which requires a court order to resolve.

The court ignored Plaintiff's citations to S.C. Code Ann. 15-53-20 (1976), S.C. Code Ann. 15-53-30 (1976), and S.C. Code Ann. 15-53-130 (1976) in her motion for reconsideration, which state as follows, respectively (R. pp. 1,134-1,135):

> "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations **whether or not further relief is or could be claimed**. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree."

> "**Any person interested under a** deed, will, **written contract** or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise **may have determined any question of construction or validity arising under the instrument**, statute, ordinance, contract or franchise **and obtain a declaration of rights, status or other legal relations thereunder**."

> "This chapter is declared to be remedial. Its purpose is **to settle and to afford relief from uncertainty and insecurity** with respect to rights, status and other legal relations. **It is to be liberally construed and administered.**" [Emphasis added.]

Plaintiff believes the foregoing statutes are clear that it is irrelevant whether she will ultimately be able to establish damages after her declaratory judgment action has

been actually litigated and adjudicated on the merits. It is clear in Plaintiff's prayer for relief that she did not bring a fraud claim for the purpose of persuading the court to award her monetary damages because she did not ask for an award of monetary damages there. (R. pp. 76-77) In her pleadings, Plaintiff made it clear she took legal action seeking to ensure that her home can never be literally stolen from her based on the false claims of predatory loan servicers who have no interest in equity and invalid instruments. (R. pp. 76; 441-442)

Plaintiff's causes of action and allegations in her complaint were all clearly raised for the purpose of persuading the court why it should declare the instruments invalid and unenforceable, order the lien removed and the permanent injunctions she was seeking. Plaintiff believes the foregoing statutes are clear that she can litigate her action "to settle and to afford relief from uncertainty and insecurity" with respect to her property title and her rights and interests in her property. Consequently, Plaintiff fails to see how her "fraud claims" can be barred for failure to establish damages before her case has even been tried and adjudicated on the merits.

Nevertheless, out of an abundance of caution, Plaintiff raised in her second motion for reconsideration a request for bifurcation as follows:

> "To the extent Your Honor still believes, notwithstanding the foregoing, that any particular part of Plaintiff's causes of action or any particular part of her prayer for relief is barred from this Court's consideration, Plaintiff respectfully requests a bifurcation of that part or parts so that the remainder may survive and her declaratory judgment action may proceed and be adjudicated based upon the merits of the remainder." (R. p. 1,135)

Since the trial court was so quickly persuaded that Plaintiff's causes of action were barred by *judicial estoppel* and *res judicata* due to her bankruptcy filings, Plaintiff was not

surprised that the court ignored the issue of bifurcation without addressing it, although she believes the court erred in doing so. Plaintiff raised this issue to preserve it for her appeal, and Plaintiff now raises this issue before this Court for consideration.

Plaintiff, being a *pro se* litigant, did her very best to plead sufficient facts and law in her pleadings, but to the extent this Court finds any errors or deficiencies because she lacks the same level of expertise as an attorney, Plaintiff prays this Court will bifurcate such errors or deficiencies from her action and remand her remaining viable legal arguments and requests for relief to proceed to judgment or settlement based on the merits so justice may be done.

CONCLUSION

For the reasons stated, this Court should reverse the decisions and final judgment of the circuit court in its Orders entered on February 27, 2013, April 9, 2013, October 9, 2013, and November 6, 2013, and order any and all other remedies or instructions as this Court deems just and proper.

Respectfully submitted,

March 19, 2014

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Appellant/Plaintiff *Pro Se*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Maité Murphy, Circuit Court Judge

Civil Action Case No. 2012-CP-15-00262
Appellate Case No. 2013-002555

Melissa Jean Marks, ...Appellant,

v.

Nationstar Mortgage, LLC, ...Respondent.

CERTIFICATE OF APPELLANT

The undersigned certifies that the Final Brief of Appellant complies with the requirements of Rule 211(b), SCACR.

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Round O, South Carolina
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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on the Respondent, Nationstar Mortgage, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on March 19, 2014, addressed to its attorney of record, Robert A. Muckenfuss, Esq., McGuireWoods LLP, 201 North Tryon Street, Suite 3000, Charlotte, NC 28202, and on Old South Mortgage Corporation, by depositing a copy of it in the United States Mail, postage prepaid, on March 19, 2014, addressed to its attorney of record, John F. Knobeloch, Esq., King & Knobeloch, P.C., 808 Johnnie Dodds Blvd., Mt. Pleasant, SC 29464.

Respectfully submitted,

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